No. 09-1004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EMMETT J. JAFARI,

Plaintiff-Appellant,

v.

OLD DOMINION TRANSIT MANAGEMENT COMPANY
d/b/a Greater Richmond Transit Company,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

INFORMAL BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST

The Secretary of Labor ("Secretary") has a substantial interest in the proper construction of section 15(a)(3) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 215(a)(3), because she administers and enforces the FLSA, *see* 29 U.S.C. 204(a), 204(b), 216(c), 217, and section 15(a)(3) is central to achieving FLSA compliance. *See Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Furthermore, the principles at issue could affect compliance under the anti-retaliation provisions of other statutes for which the Secretary

has responsibility. The Department of Labor administers or enforces numerous anti-retaliation provisions, the majority of which are similar to section 15(a)(3) of the FLSA in that they do not expressly protect employees who internally complain to their employers. *See, e.g.*, section 11(c) of the Occupational Safety and Health Act ("the OSH Act"), 29 U.S.C. 660(c)(1) (prohibiting retaliation against "any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter..."); section 505 of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. 1855(a) (prohibiting retaliation against a worker who has "filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding"); and section 2 of the Solid Waste Disposal Act, 42 U.S.C. 6971(a) (prohibiting retaliation against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter").

The Secretary has consistently taken the position that section 15(a)(3) protects internal complaints to an employer. *See, e.g.* Brief for the Secretary of Labor as *Amicus Curiae*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 7th Cir. No. 08-2820. Thus, a decision by this Court that internal

complaints are not covered would have an adverse impact upon the effective administration of the Department of Labor's programs.

The Equal Employment Opportunity Commission ("EEOC") is a signatory to the Secretary's *amicus* brief because it is the agency charged by Congress with the interpretation, enforcement, and administration of the Equal Pay Act of 1963, 29 U.S.C. § 206(d), which is codified as part of the FLSA and incorporates section 15(a)(3). The EEOC therefore has a strong interest in the proper interpretation of that provision.

STATEMENT OF THE ISSUE

Whether section 15(a)(3) of the FLSA protects an employee who makes a complaint to his employer alleging violations of the Act.

STATEMENT OF THE CASE

Emmett Jafari brought this action against his former employer, the Old Dominion Transit Management Company d/b/a The Greater Richmond Transit Company ("GRTC"), alleging that GRTC terminated his employment in retaliation for his written complaints to the company's benefits plan administrator claiming that he had not been paid the overtime to which he was entitled. *See Jafari v. Old Dominion Transit Management Co.*, 2008 WL 5102010, *1-*2 (E.D. Va. Nov. 28, 2008). Jafari, who GRTC hired as a van driver as part of its participation in the Virginia

Initiative for Employment not Welfare program, alleged that he had not been paid overtime. *Id.*

GRTC moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that, even if Jafari's claim were true, his written internal complaints were not protected by the FLSA's anti-retaliation provision (Def. Mot. for Summ. Judgment at 12-13); *Jafari*, 2008 WL 5102010 at *1. The district court granted GRTC's motion, holding that internal complaints are not protected activity under section 15(a)(3). *Jafari*, 2008 WL 5102010 at 5-6. The district court based its decision on this Circuit's unpublished decision in *Whitten v. City of Easley*, No. 02-1445, 2003 WL 1826672, at *2 (4th Cir. Apr. 9, 2003), in which this Court interpreted its prior decision in *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363-65 (4th Cir. 2000), as holding that section 15(a)(3) does not protect internal complaints. *Id.* The district court rejected Jafari's argument that this Court's decision in *Rayner v. Smirl*, 873 F.2d 60, 63-64 (4th Cir. 1989), which held that the anti-retaliation provision of the Federal Railroad Safety Act ("FRSA") protected internal complaints, should apply to complaints under the FLSA, noting that the district court had previously found the analogy to that statute unpersuasive. *Id.*; *see Boateng v. Terminex*

Int'l Co., No. CIV.A. 07-617, 2007 WL 2572403, at *3 (E.D. Va. Sept. 4, 2007) (unpublished).[1]

ARGUMENT

SECTION 15(A)(3) OF THE FLSA PROTECTS AN EMPLOYEE WHO MAKES AN INTERNAL COMPLAINT TO HIS EMPLOYER ALLEGING VIOLATIONS OF THE ACT.

A. Section 15(a)(3) Covers Internal Complaints

When the FLSA was enacted in 1938, Congress included an anti-retaliation provision at section 15(a)(3). Section 15(a)(3) of the FLSA provides, in relevant part:

> [I]t shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding[.]

[1] In *Rayner*, 873 F.2d at 63-64, this Court interpreted anti-retaliation language almost identical to that found in the FLSA. At the time, the FRSA anti-retaliation provision protected any covered employee who "(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or (2) testified or is about to testify in any such proceeding." 45 U.S.C. 441 (1989). FRSA's anti-retaliation provision was amended on August 3, 2007, by section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007. *See* 49 U.S.C. 20109. Prior to the amendment, retaliation complaints by railroad carrier employees were subject to mandatory dispute resolution by the National Railroad Adjustment Board. The amendment changed the procedures for resolution of such complaints and transferred the authority to implement the retaliation protections for railroad carrier employees to the Secretary of Labor.

29 U.S.C. 215(a)(3).[2] As recognized by the Supreme Court, this anti-retaliation provision is critical to ensuring effective compliance with the substantive provisions of the FLSA. *See DeMario Jewelry*, 361 U.S. at 292. Compliance with the FLSA depends on employees providing information about violations of the statute without fear of retaliation. "Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Id*.

By contrast, any interpretation of section 15(a)(3) that discourages an employee from complaining to his employer about minimum wage and overtime violations would undermine not only Congress's prescribed compliance mechanism but also the substantive rights of the FLSA. "[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *DeMario Jewelry*, 361 U.S. at 292. By proscribing retaliation,

[2] There is little legislative history concerning the intended scope of section 15(a)(3). The provision was not the subject of congressional debate or explained in the relevant reports except for a general statement, in H.R. Conf. Rep. No. 75-2738, at 33 (1938), that section 15 makes it unlawful "to do certain other acts which violate provisions of the Act or obstruct its administration."

the Court observed, "Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Id.*; *see Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67 (2006) (citing *DeMario Jewelry*, Court states that Title VII's anti-retaliation provision seeks "to provide broad protection from retaliation [that] helps assure the cooperation upon which accomplishment of the Act's primary objective depends"); *see also Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, --- U.S. ---, 129 S. Ct. 846, 852 (2009) (noting in Title VII case "that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination") (internal quotation marks omitted).

Relying on *DeMario Jewelry*, a clear majority of appellate courts have broadly construed section 15(a)(3)'s language prohibiting retaliation against an employee who "has filed any complaint or instituted or caused to be instituted any proceeding" to protect "internal" complaints to the employer. *See Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 625-26 (5th Cir. 2008) (informal, internal complaint constitutes protected activity under FLSA anti-retaliation clause "because it better captures the anti-retaliation goals of that section."); *Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004) (section 15(a)(3) can be triggered by informal complaints);

Lambert v. Ackerley, 180 F.3d 997, 1004 (9th Cir. 1999) (section 15(a)(3) protects "employees who complain about violations to their employers"); *Valerio v. Putnam Assocs.*, 173 F.3d 35, 41 (1st Cir. 1999) (section 15(a)(3) protects an employee who has filed complaint with employer); *EEOC v. White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989) (employees' unofficial internal complaints to their supervisor about unequal pay constituted assertion of rights protected under Equal Pay Act, part of the FLSA); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (Equal Pay Act's anti-retaliation provision "applies to the unofficial assertion of rights through complaints at work"); *see also Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (employee protected under section 15(a)(3) for complaining to employer about returning back wages following employer's settlement with the Wage and Hour Division). *But see Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (plain language of section 15(a)(3) does not encompass complaints made to a supervisor); *Whitten v. City of Easley*, *supra*.

These courts have concluded that the plain language "filed any complaint" under section 15(a)(3) encompasses internal complaints filed with employers. *See, e.g., Ackerley*, 180 F.3d. at 1004; *Valerio*, 173 F.3d at 41. In *Ackerley*, for example, the Ninth Circuit reasoned that read literally, section 15(a)(3)

extends to "complaints" made to employers. 180 F.3d at 1004 ("If 'any complaint' means 'any complaint,' then the provision extends to complaints made to employers."). *See also Valerio*, 173 F.3d at 41 ("By failing to specify that the filing of any complaint need be with a court or an agency, and by using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest ... conveyed to an employer."). With respect to the requirement that the complaint be "filed," the Ninth Circuit also stated that it was convinced that the term includes filing complaints with employers. *Ackerley*, 180 F.3d. at 1004 ("Given the widespread use of the term 'file' to include the filing of complaints with employers, it is therefore reasonable to assume that Congress intended that term as used in section 215(a)(3) to include the filing of such complaints.").[3]

[3] The First Circuit stated in *Valerio* that, "Webster defines 'file' both as 'to deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office' and 'to place (as a paper or an instrument) on file among the legal or official records of an office esp[ecially] by formally receiving, endorsing, and entering.'" 173 F.3d at 41 (citing Webster's Third New International Dictionary, at 849). The latter definition "is sufficiently elastic to encompass an internal complaint made to a private employer with the expectation the employer will place it on file among the employer's official records." *Id.* at 41-42.

Furthermore, as the First Circuit recognized in *Valerio*, if "filed any complaint" under section 15(a)(3) includes "only the filing of in-court or in-agency complaints," it would render the remainder of the clause, i.e., the "instituted or caused to be instituted any proceeding" language, mere "surplusage," *Valerio*, 173 F.3d at 42, because the filing of a complaint with a court or agency is indistinguishable from instituting a proceeding. It is a well-settled principle of statutory construction that courts should "assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995). Accordingly, "the inclusion of informal complaints creates a meaningful distinction between the ["filed a complaint" and "instituted any proceeding" clauses] of the FLSA's anti-retaliation ["complaint clause"] provision." *Haile-Iyanu v. Central Parking System of VA, Inc*., 2007 WL 1954325 at *4 (D.D.C. July 5, 2007).

The Secretary urges this Court to conclude, along with virtually all other appellate courts that have considered the issue, that section 15(a)(3) protects internal complaints. As discussed above, the plain language of the FLSA's anti-retaliation provision covers an employee's complaints to his employer.

Significantly, appellate courts have affirmed decisions issued by the Secretary and the Administrative Review Board (to which the Secretary has delegated authority to issue final agency decisions in whistleblower cases, *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002)) holding that internal complaints to employers are protected under other whistleblower statutes that do not expressly cover internal complaints. *See, e.g., Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (Clean Water Act's employee protection provision protects employees who complain to their employer); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-1512 (10th Cir. 1985) (pre-1992 amended Energy Reorganization Act whistleblower provision covers internal complaints); *MacKowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984) (same).[4] These agency decisions interpreting whistleblower protection statutes with language similar to that contained in section 15(a)(3) of the FLSA as protecting internal complaints are entitled to deference

[4] The Fifth Circuit initially held that the whistleblower provision of the Energy Reorganization Act ("ERA"), prior to its amendment in 1992, did not cover internal complaints. *See Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031-32 (5th Cir. 1984). However, in *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489 n.11 (5th Cir. 2005), the Fifth Circuit noted that its holding in *Brown & Root* was legislatively overruled and that Congress always had intended the ERA to protect internal complaints. *See also* 42 U.S.C. 5851(b).

under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) ("[A] reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the ... adjudication process that produces the ... rulings for which deference is claimed."); *see also Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008).

B. This Court's Decision in *Memphis Bar-B-Q* Does Not Preclude the Conclusion that Section 15(a)(3) Protects Internal Complaints

In concluding that internal complaints are not covered under section 15(a)(3), the district court in the instant case relied on this Court's unpublished decision in *Whitten*, which in turn relied on its earlier decision in *Memphis Bar-B-Q*. *See Jafari*, 2008 WL 5102010, at *5 (E.D. Va. Nov. 28, 2008).[5] At

[5] Recently, the same district court relied on *Whitten*'s interpretation of *Memphis Bar-B-Q* to conclude that section 15(a)(3) does not protect internal complaints in an EPA case. *See Bell-Holcombe v. Ki, LLC*, 582 F. Supp. 2d 761, 766 (E.D. Va. 2008). The EEOC treats retaliation under the EPA in the same manner that it treats retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), the Age Discrimination in Employment Act, 29 U.S.C. 623(d), and the Americans with Disabilities Act, 42 U.S.C. 12203(a), all of which contain "opposition" clauses prohibiting retaliation against individuals who oppose any practice made unlawful by those Acts. *See* EEOC Compliance Manual § 8-I(A) & n.12, found at

issue in *Memphis Bar-B-Q* was whether the second clause of section 15(a)(3) -- the "testimony clause" -- protects an employee who informs his employer that, if deposed in a FLSA lawsuit that another employee threatened to file against the employer, he would not testify in the manner suggested by the employer. 228 F.3d at 362. This Court concluded that although section 15(a)(3) protects an employee "about to testify in [a] proceeding," it does not protect an employee who may testify in another employee's not-yet-filed lawsuit. 228 F.3d at 363-65. This Court based its decision on what it considered to be the "formality" of the anti-retaliation provision's "testimony clause," reasoning that "[b]y referring to a proceeding that has been 'instituted' and in which 'testimony' can be given, Congress signaled its intent to proscribe retaliatory employment actions taken after formal proceedings have begun, but not in the context of a complaint made by an employee to a supervisor about a violation of the FLSA." *Id.* at 364. This Court emphasized that its decision in *Memphis Bar-B-Q* extended only to the "testimony clause" of section 15(a)(3) because the petitioner (unlike the employee in the case at bar) had not

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http://www.eeoc.gov/policy/docs/retal.html; *see also Crawford,* 129 S. Ct. 846, 849.

invoked the section's "complaint clause," and further noted that it had previously interpreted similar "complaint clause" language in the FRSA to include internal complaints. *Id.* at 363 n.* (citing *Rayner*, 873 F.2d at 63-64).

Later, in *Whitten*, this Court erroneously interpreted *Memphis Bar-B-Q* as applying to the FLSA anti-retaliation provision's "complaint clause" as well as its "testimony clause." *See Whitten*, 2003 WL 1826672 at *3 ("[T]his Court has expressly held that the FLSA's anti-retaliation provision does not extend to internal complaints."). The *Whitten* decision, *id.*, cited the following statement in *Memphis Bar-B-Q* as the basis for its holding: "We would be unfaithful to the language of the testimony clause of the FLSA's anti-retaliation provision if we were to expand its applicability to intra-company complaints," 228 F.3d at 364, without noting that the statement was limited to the testimony clause and without any consideration of the contrary statement regarding internal complaints elsewhere in the *Memphis Bar-B-Q* opinion. *See Memphis Bar-B-Q*, 228 F.3d at 363 n.* (noting that this Court found similar language in the FRSA to protect internal complaints). As an unpublished decision, this Court's holding in *Whitten* is not binding. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006) (recognizing that this Court "ordinarily do[es] not accord precedential value to our

unpublished decisions," and that such decisions "are entitled only to the weight they generate by the persuasiveness of their reasoning") (internal quotation marks and citation omitted). Because the *Whitten* decision misinterpreted the scope of the *Memphis Bar-B-Q* holding, its persuasiveness is limited, *see id.*; accordingly, this Court should not adopt the *Whitten* holding as the law of this Circuit.

Rather than extending its holding in *Memphis Bar-B-Q* to the "complaint clause" of section 15(a)(3), this Court should follow the rationale it applied in *Rayner*. *See* 873 F.2d at 64. After noting that as a safety statute the FRSA should be interpreted broadly, this Court held in *Rayner* that it was "Congress' intent to protect all railroad employees who report safety violations" and that "[t]he distinction between intra-corporate complaints and those made to outside agencies is therefore an 'artificial' one." 873 F.2d at 64 (quoting *Rayner*, 687 F. Supp. 993, 995 (D. Md. 1988). Similarly, the FLSA, as a remedial statute, should be interpreted broadly. *See*, *e.g.*, *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 296 (1985) (noting that "the Court has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction") (internal quotation marks and citation omitted); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 340 (4th Cir. 2008) (recognizing that the court "must interpret the [FLSA] retaliation provision

bearing in mind the Supreme Court's admonition that the FLSA 'must not be interpreted or applied in a narrow, grudging manner'") (citation omitted; quoting *Tennessee Coal, Iron & RR. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), superseded by statute on other grounds (citation omitted)). The Supreme Court has concluded that "[t]he central aim of the [FLSA] was to achieve ... certain minimum labor standards" and that, because Congress "chose to rely on information and complaints received from employees ... effective enforcement could ... only be expected if employees felt free to approach officials with their grievances." *DeMario Jewelry*, 361 U.S. at 292. As with the FRSA, the distinction between external and internal complaints under the FLSA is "'artificial,'" *see Rayner*, 873 F.2d at 64, and to exclude the latter from coverage would undermine the purpose of the Act's anti-retaliation provision.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling in this case that section 15(a)(3) does not cover internal complaints.[6]

Respectfully submitted,

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[6] The Secretary takes no position on whether Jafari's anti-retaliation claim under the FLSA has merit.

CERTIFICATE OF SERVICE

I certify that copies of the Informal Brief for the Secretary of Labor and the Equal Employment Opportunity Commission As *Amicus Curiae* In Support of Plaintiff-Appellant have been served on the following individuals this 11th day of March 2009:

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